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No. 398

IN THE

SUPREME COURT

OF THE

United States

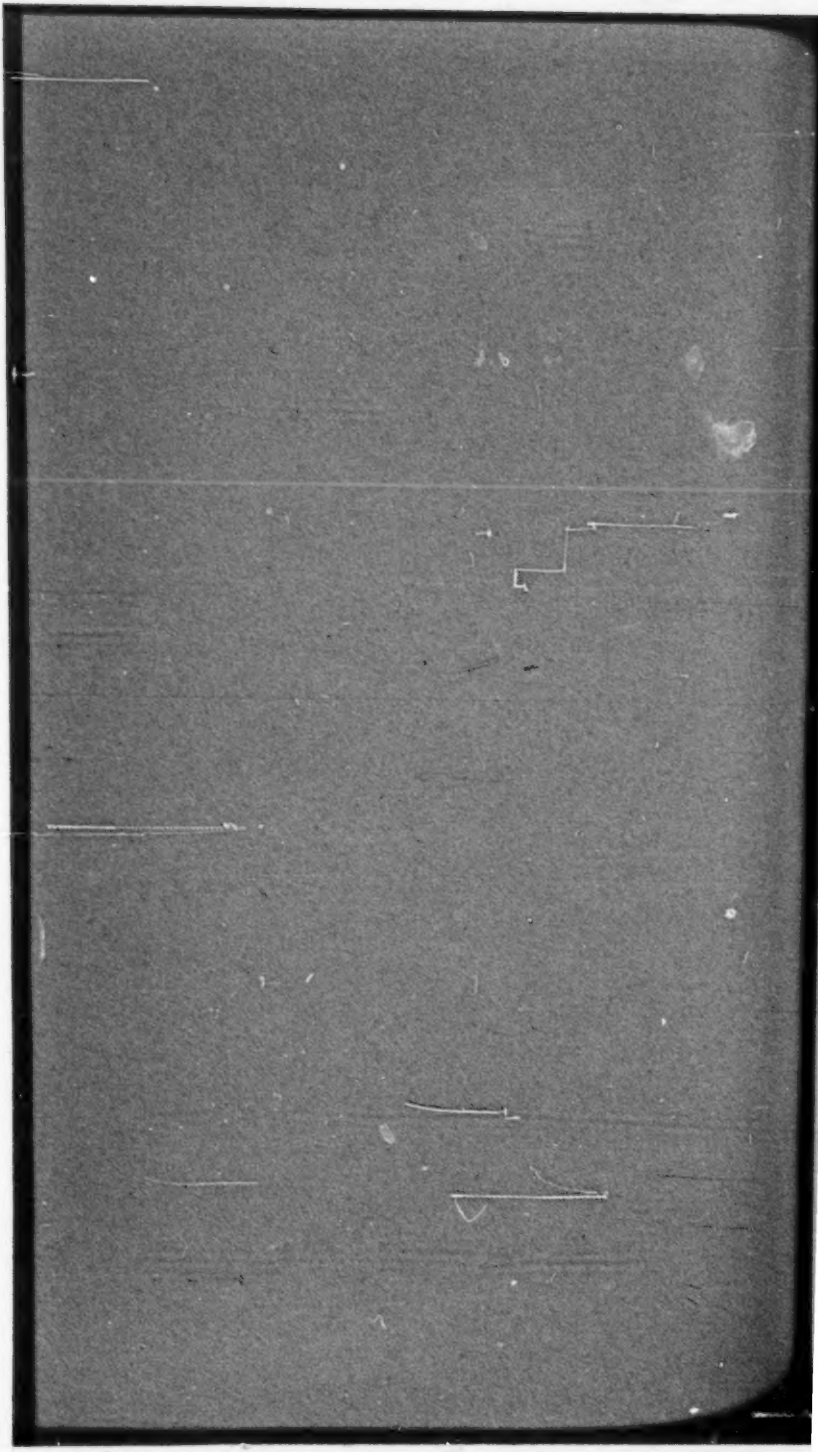
October Term, 1955

VERN GEORGE DAVIDSON,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

J. B. TIETZ
257 S. Spring Street
Los Angeles 12, Calif.
Counsel for Petitioner.

JOE E. BOGEN
On the Argument.



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To the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Southern District of California, Central Division, convicting the petitioner of a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

1. OPINION OF THE COURT BELOW:

The opinion of the United States Court of Appeals is not yet reported. It is in the Record, pages 107-108. It is also Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION.

The judgment of the Court of Appeals was entered on August 17, 1955 [R. 109;* also see Appendix B to this petition].

The petition for writ of certiorari is filed within the required thirty days' time.

The jurisdiction of this Court rests on Section 1254 (1) of the Judicial Code, 28 U. S. C. The district court has jurisdiction under 18 U. S. C. §3231.

3. QUESTIONS PRESENTED AND HOW RAISED.

I.

The record shows that this Court set a task for the court below, namely, to consider whether Davidson's conscientious objector claim comes with §6(j) of the Act. The court below disposed of its assigned task without comment and by a one sentence *per curiam* opinion giving a negative answer.

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*All references to the Transcript of Record are designated by pages of it, as follows: [R. 3]. The entire Selective Service File of appellant was entered in evidence as Government's Exhibit 1. All references to the file are designated by pages of Exhibit 1, as follows: [Ex. 3]; the pagination of Exhibit 1 is by a one-quarter inch high pencilled number, circled, and ordinarily is found at the bottom of each sheet of Exhibit 1.

The question presented is whether the conclusion of the court below is supported by any factual basis and whether the conclusion is legally sound. Also involved is whether there has been sufficient compliance with the command of the Court that the problem be considered.

4. STATUTES AND REGULATIONS INVOLVED.

Section 6(j) of the Act (50 U.S.C. App. (Supp. V) §456(j), 65 Stat. 75, 83, 86) is printed as Appendix C below.

5. STATEMENT OF THE CASE.

The *per curiam* opinion of the court below (see Appendix A herein) presents the origin and history of the present cause.

A background Statement of The Case may be found in petitioner's *first* Petition for a Writ of Certiorari (pages 6-10) October Term, 1954, No. 644.

6. REASONS FOR GRANTING WRIT.

This Court directed the court below to determine whether petitioner's conscientious ojection claim comes within the provisions of §6(j) of the draft law. It is an important, nation-wide question, and should be finally determined by *this* Court because several religions with several hundred thousand American members neither accept (1) the usual belief in, or definition of "a Supreme Being" or (2) that the essentially religious conscientious objections to war of those of

their members who have such views, may not be mixed with other factors, such as economic or political reasons.

It is petitioner's position that it was the intent of Congress that *all* selective service registrants, claiming to be conscientious objectors, have their claims *determined* by the provisions of §6(j) and that they not be defeated by preliminary "screening" or in any manner other than as provided in §6(j); that they are thus all "within" §6(j).

It is petitioner's position that the two opinions of the Court of Appeals are inconsistent in that the first opinion "examined with care" the contentions advanced and nowhere found that Davidson was not "within" §6(j); on the contrarv, the detailed consideration given was all on the implied assumption that Davidson was within §6(j).

It is important that the protection given by Congress to the right of conscience be guarded; it is important that a boy's claim be rejected only as Congress intended, namely, after a thorough FBI investigation and by officials removed from local prejudices. It is important that "short-circuiting" by unauthorized officialdom be rejected by the courts.

Fundamental to the questions presented by the petitioner are the following assumptions:

1. That the Court is not concerned with whether or not he *is* a conscientious objector; that such

a question is *solely* one for the Selective Service System.

United States vs. Estep, 327 U. S. 114.

2. That the Court's concern is solely over the narrow question: was the *claim* of Vern George Davidson to a conscientious objector classification within the provisions of §6(j)?

ARGUMENT

Petitioner and all others similarly situated are entitled to all the due process provided for and accorded others professing to be conscientious objectors.

Petitioner will argue that if he is to be excluded from among those to whom §6(j) gives the right of the special appellate procedures, this Court would then be doing each and all of the following:

I. It would be performing an administrative function while ignoring longstanding administrative precedent;

II. It would ignore all judicial precedent, with one distinguishable exception;

III. It would rule section 6(j) to be internally inconsistent;

IV. It would be overruling *United States vs. Estep;*

V. It would make a finding of fact without admitting relevant testimony;

VI. It would interpret §6(j) in a manner inconsistent with the presumption of its constitutionality.

I.

IT WOULD BE PERFORMING AN ADMINISTRATIVE FUNCTION WHILE IGNORING LONG-STANDING ADMINISTRATIVE PRECEDENT.

It goes without saying that every claim presented by a registrant in his Classification Questionnaire, (SSS Form No. 100) must be considered by his local board. The clerk, the group coordinator, the area auditor, the area coordinator, etc., etc., even one or more board members, may sincerely (and with some reason) consider one or more of his claims patently without basis, but each must be considered by a quorum of the board. There is no provision for "sifting", "predetermining", or "short-circuiting" by the clerk or other intermediate officials. The gist of petitioner's argument is that there is the same absence of any provision for "short-circuiting" or "directed verdicts" in the appellate procedural law relating to administrative appeals by conscientious objectors.

Petitioner believes that the touchstone of decision in the problem posed is Congressional intent. First, a preliminary consideration: Congress unquestionably intended to favor and protect that small class of registrants who assert they are conscientious objectors to participation in warfare. Petitioner submits that this particular intent is recognized and requires no argument.*

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*"Congress in its wisdom considered it more essential to respect a man's religious belief than to force him to serve in the armed forces. The draft boards and the courts are bound to carry out this policy." *Williams vs. United States*, 216 F. 2d 350.

Quoted with approval in *Riles vs. United States*, 5 Cir., June 21, 1955, 223 F. 2d 786, 792.

Also see *Olvera vs. United States*, 223 F. 2d 880, decided June 17, 1955, 5 Cir., that the statute under construction is a statute of religious liberty.

The real question now faces us: Did Congress intend to throw this mantle of protection around *all* claimants? An inspection of the statute requires that the answer be yes. The section provides standards for judgment of claims presented and it provides appellate procedures for processing initially rejected claims. The provisions relating to standards for judgment do not concern us in our problem, because this is solely an administrative matter. The Courts do not attempt to look into the nature of the registrant's objections. They have always avoided this type of review. The provisions relating to appellate procedures do concern us in our problem, for this is not only the question posed but is the only area subject to judicial concern, absent an assertion by an aggrieved registrant that the provisions relating to standards for judgment are constitutionally improper. Petitioner made such a charge earlier but does not urge it now because of the delimiting nature of the Order made by this Court.

Section 6(j) obviously contemplates that there will be registrants asserting claims for conscientious objector classifications who the local boards believe are not entitled to it; Congress consequently set up the special appellate provisions. The wisdom of this special appellate procedure is evident from the fact that a considerable proportion of the registrants who receive the conscientious objector classification eventually receive it from the *appeal* boards.

Short circuiting would have deprived these appeal boards of the new facts revealed by the FBI investiga-

tions and the facts and interpretation brought to light by the Hearing Officer Hearings. Thus, the registrants affected would have been in the same position as Davidson on his second "appeal": judged by and on a partial, and obsolete record, as well as without opportunity to rebut.

The *procedural* provisions are the ones that determine the rights of a registrant like this petitioner. If it were otherwise, that is, if a court were to first attempt a determination of whether he is within the substantive provisions, then this would not only be a usurping of the function of the Selective Service System but the appellate provisions would then be superfluous, for if the registrant falls within the standards of §6(j) he needs no appeal.

Section 6(j) provides for an administrative means of determining the facts involved in a disputed claim. These means have been termed the special appellate procedures for conscientious objectors. These special appellate procedures were evolved chiefly to take the problem away from the realm of local prejudice and of arbitrary action.

> "Local boards and boards of appeal generally brought little sympathy to the consideration of these [conscientious objector] cases."*

Selective Service in Wartime, Second Report of the Director of Selective Service (Washington: 1943), p. 258.

It must be remembered that, until 5 January, 1953, the appellate procedure was this: the file on appeal went to the appeal board for a decision on the same record the local board used and then, if and when the appeal board did not reclassify into the conscientious objector classification desired, the file was augmented by the Hearing Officer's and Attorney General's observations based on an FBI investigative report and sent back to the appeal board for its second and final decision.

After 5 January, 1953, the appeal board was bypassed until the file was augmented. Then the augmented file went to the appeal board for its decision.

Observe that no provision was made in section 6(j) to give any officials the power to "short-circuit" such registrants, as the Hearing Officer did in the "second appeal" in this case.**

Such a short-circuiting would defeat the very purpose of the special procedures. Only the appeal board, *after* the special appellate procedures have been used, is empowered to make a final decision. To permit an intermediate final decision is to thwart the will of Congress. It has always been so.

> "The Department of Justice and Selective Service took the position that *each* time the case of a registrant, *who claimed* to be a conscientious objector came before a board of appeal, the case must be referred to the Department of Justice for its recommendation. This was felt to be the direct application of the law. In addition, such reference was necessary because new factors in the case might be brought to light by the Department's investigation and hearing. The attention of the State Directors of the System was invited to this approach through the issuance of State Director Advice No. 250-D on April 19, 1945." [Italics supplied] 11 *Conscientious Objectors,* Text, page 150 [published by the Selective Service System, 1950].

This publication is part of an 18 volume series and "Volume 11, Text" was prepared by eight colonels and a civilian Ph.D. for the Selective Service System,

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**Also, see *Sterrett vs. United States,* 9th Cir., 216 F. 2d 659, where the United States Attorney "short-circuited" registrants. Also see *DeMoss vs. United States,* 75 S. Ct. 659, where an 8th Cir. decision *contra* to *Sterrett* was reversed on confession of error by the Government.

with a Foreword by Lewis B. Hershey, Director. This long-standing administrative interpretation should be given "persuasive weight". See *Sterrett vs. United States,* 9 Cir. (1954) 216 F. 2d, 659, 664-665.

The Selective Service System has taken the position from the beginning, that all appeals of registrants claiming to be conscientious were to be administered by the special appellate procedure. On June 10, 1955 the Director, General Lewis B. Hershey, for the first time, varied from his historical position, but this variance only emphasizes the meaning of both the law *as it stands today* and the long-standing administrative interpretation. Testifying before the Senate Armed Services Committee, June 10, 1955, on H. H. 3005, General Hershey asked for two amendments to the law:

> "First, the requirement for the referral to the Department of Justice, of appeals taken from the local board to the State appeal board by persons who claim to be opposed to any type of service, and secondly, to spell out the intention of Congress by restating the basic principle that in determining the classifications of each individual, local boards are authorized to consider all facts touching upon individual cases."*

*Page 225, *Hearings before the Committee,* June 9 and 10, 1955. The specific language desired by General Hershey was given by him on page 235. The gist of it is that Department of Justice participation would be eliminated and that "humility", "piety", etc., would be factors to be considered in judging the claims of conscientious objectors.

These proposals of General Hershey were flatly turned down.

II.

IT WOULD IGNORE ALL JUDICIAL PRECEDENT, WITH ONE, DISTINGUISHABLE EXCEPTION

In the *Sterrett* case, *supra,* the Government argument rode hard on the word "such". That this argument was carefully considered is evident from pages 662 and 663 of *Sterrett.* The Court rejected it. For reasons given there the argument fails when applied to this petitioner's case, for Congress meant *all* who presented conscientious objector claims.

All "short-circuiting" or control over the appeal board's action should be rejected. The draft law contains no provision for "directed verdicts". For example, see *United States vs. Hertzog,* 122 F. Supp. 632, 635. In this case the Attorney General tried to control the appeal board by telling it that a certain belief, namely in theocratic warfare, "removed" the registrant from the "purview" of the Act. This decision is in line with the conclusions of several Courts of Appeal that have recently held that such beliefs do not disqualify a registrant from a conscientious objector classification. See *Hinkle vs. United States,* 9th Cir., 216 F. 2d 8, citing recent 2d, 8th and 10th Circuit decisions. This Court disposed of the matter on March 14, 1955 in *Sicurella vs. United States,* 75 S. Ct. 403.

All registrants professing to be conscientious objectors are entitled to the full conscientious objector's appellate proceedings. See the earliest decision, that of Judge Dal Lemmon, when he was a district judge,

United States vs. Frank, 114 F. Supp. 949, wherein he held that "somewhere along the line" the registrant was entitled to all the proceedings. Also, see *Sterrett, supra.* Note its repeated expressions "all conscientious objector claims," "any appeal," "all cases." Particularly note the following from page 664:

> "There is no doubt but that the legislative history of §6(j) indicates that it was the understanding and intention of Congress to provide a reference of all conscientious objector claims not initially granted by the appeal board to the Department of Justice."

In *Sterrett's* case the United States Attorney [who acts as a traffic manager in conscientious objector appeals] denied the "special procedures" to Sterrett on the basis that the registrant was outside the purview of the section and was not entitled to them. The reason given was held to be an invalid one by the Court of Appeals. Petitioner here submits there is no difference in principle between *Sterrett's* case and his case; that *every* registrant professing to be a conscientious objector is entitled to have his claim determined as Congress provided.

The same argument, in principle, was also made by the Government in a long line of Jehovah's witness cases on several different points, namely, that since the record disclosed the registrant believed in theocratic warfare, (or in self-defense, or in working in steel plants, etc., etc.) the Department of Justice could take it upon itself to advise the appeal board the regis-

trant didn't qualify because "on its face" the claim of the registrant was without the law.

Appellant's position, in short, is that this matter is not for the Department to decide. Once the *claim* of conscientious objection is made, Congress intended that the full special appellate procedure be given the registrant; that it was intended that the claim be *so determined* and not that it be predetermined by short-circuiting by any person or technical step of intermediate procedure.

Possibly respondent will argue that *United States vs. De Lime,* 121 F. Supp. 750, affirmed May 26, 1955, 3d Cir., 223 F. 2d 96, supports its position because De Lime was an agnostic and the Court of Appeals held "Consequently, the defendant's own uncontradicted statements demonstrate that his claim was not based on 'religious training and belief,' within the meaning of the statute. Therefore, he was not prejudiced by not receiving an adequate or fair resume of the FBI report." [100]

The *De Lime* situation is distinguishable from petitioner Davidson's case because of the following:

The *De Lime* opinions disclose that he *was* given all the special appellate procedures. He could not complain, as this appellant does, that he was deprived of them. It was obviously understood by all who processed him that De Lime came *within* the procedural provisions of §6(j). De Lime was denied the claimed I-0 classification by the appeal board after it had consid-

ered a record that included *all* the special procedures. The classification was upheld by the district court and the 3rd Circuit affirmed because there was a basis of fact for the Selective Service System Appeal Board to so decide: De Lime's uncontradicted and uninterpreted agnostic statements. Even if the *De Lime* opinion is a good law on De Lime's facts, *De Lime* doesn't apply to the *Gonzales* point. *De Lime* is based on *Simmons vs. United States,* 75 S. Ct. 397.

If appellant Davidson had been given the full appellate procedures his case still would be different from De Lime's because the record shows it was contended in the trial court by expert evidence and by argument that Davidson's actions modified his words to the extent that his way of living showed he was "religious within the definition of the Act. In any event Davidson was entitled to have the appellate procedures, provided by Congress, as much as De Lime. *Gonzales, supra,* then would apply. If Davidson had received them the particular question posed by the Court would not have arisen. Having arisen it should be answered affirmatively.

It cannot be said that the special appellate procedures would be a vain act or a useless waste of time. The investigatory procedures of the FBI and the hearing officer hearing might have disclosed new facts or nuances of old facts that might well have altered the appeal board's attitude. Almost two years had elapsed since the "first" appeal. This is precisely what the Selective Service System publication meant when it

said " . . . In addition, such reference was necessary because new factors in the case might be brought to light by the Department's investigation and hearing." [See hereinabove, page 9.]

The Court declared in its order* that the conviction must be reversed on the basis of *Gonzales vs. United States,* 75 S. Ct. 409, if the Court of Appeals determined the remanded question affirmatively. This gives another key to the correct solution of the problem. *Gonzales* applies (and can apply) only to a situation where the registrant was not given a copy of the Department of Justice recommendation to the appeal board prior to action by the appeal board. In no other instance but that of a registrant professing to be a conscientious objector can there be a recommendation of the Department to the appeal board. It is provided for only in §1626.25, C.F.R., the special provisions for conscientious objectors. The problem, therefore, can arise only in two situations:

1. Where this type of registrant is given a conscientious objector appeal, as was this appellant, on his first appeal in toto and his second appeal in part, or,

2. Where this type of registrant was denied one, as in *Sterrett, supra.* Also see *De Moss vs. United States,* 75 S. Ct. 659, wherein the Solicitor General and the Supreme Court reached the same conclusion as the Ninth Circuit did in *Sterrett.*

*Davidson vs. United States, 75 St. Ct. 659.

In the present case the Selective Service System recognized the fact that a claim had been made. True, they considered and adjudged the claim invalid. The Selective Service System, like a court, has the right to be wrong and, as observed in the beginning, we are not concerned with the correctness of the administrative decision. But the fact remains that Selective Service System is acknowledged to be the trier of factual matters. The existence of a claim for a classification is a factual matter. A factual decision of this administrative agency is ordinarily final. It cannot be said there is no basis in fact for its decision that appellant Davidson had presented a claim for a conscientious objector classification. Its decision, therefore, is final. *Estep, supra.*

It is petitioner's expectation that the Court will distinguish his case from that of *De Lime* in view of petitioner not having received the full appellate procedures provided by §6(j) whereas De Lime did receive these appellate procedures. This is not to say that petitioner agrees with the *De Lime* decision; to the contrary, petitioner considers both the 9th and 3d Circuits to be in error as argued next.

III.

IT WOULD RULE SECTION 6(j) TO BE INTERNALLY INCONSISTENT

If petitioner is to be excluded from §6(j), the exclusion can only be made on the basis that the word "such" refers to the previous phrases "religious belief and training" and "belief in a Supreme Being". However, the word "such" cannot be understood to restrict §6(j) to any particular group of claimants for the conscientious objector status since the only possible interpretations of this nature lead to untenable conclusions.

1) Assume "such" refers to "belief in a Supreme Being" *but not to* "religious training and belief." Such an interpretation would mean that the Section 6(j) considers belief in a Supreme Being as not necessarily a religious belief. This is not consistent with either
   a) The context or grammatical construction of the sentences under consideration, or
   b) Congressional intent; surely Congress did not intend to declare a principle so much at odds with accepted ideas of what constitutes a belief in a Supreme Being.
2) Assume that "such" refers to "religious training and belief" unqualified as to belief in a Supreme Being. This is not consistent with the construction of §6(j) which says "religious training and belief shall be understood to *mean* belief in a Supreme Being . . . " [Italics

supplied.] That is, §6(j) defines the term "religious belief" in the quoted sentence. It would be inconsistent with the wording of §6(j) to consider "religious belief" without simultaneously considering "belief in a Supreme Being."

3) Assume that "such" refers to "religious training and belief" qualified to mean belief in a Supreme Being. This leads to an immediate dilemma: Since the only persons asking an appeal would be those already adjudged deficient in these requirements, and since they would have no right of appeal under this assumption, there would then be no right of appeal; and yet, §6(j) clearly anticipates that appeals will be made, giving as it does the procedure for handling them.

Petitioner's argument might be criticized by saying that laws are not seldom self-contradictory and in such cases the Court must choose one of two mutually exclusive intents. Rather than considering the law to be patently self-contradictory, this Court would do better to abandon the dilemma by abandoning the assumption that "such" refers to "religious belief and training" as qualified to mean a belief in a Supreme Being.

4) The three possible ways in which "such" could restrict §6(j) to only some claimants has each been shown to lead to inconsistencies. This is, therefore, a second and independent reason to consider §6(j) to refer to all claimants.

IV.

IT WOULD BE OVERRULING UNITED STATES vs. ESTEP

If appellant is to be excluded from §6(j), the exclusion can only be made on the basis that the word "such" refers to the previous phrases "religious belief and training" and "belief in a Supreme Being." Appellant's religious *training* is uncontested. See his answers, on the Special Form for Conscientious Objectors in the Exhibit, particularly his Sunday School attendance and his statement "My guidance on religious matters is Chandi, James, Tolstoy, Jesus."

The law [§6(j)] equates "religious belief" with "belief in a Supreme Being." Therefore, to exclude appellant on either of these latter two grounds is the equivalent of exclusion on the other. In order to exclude appellant on the basis that he does not possess a belief in a Supreme Being, this Court must first establish, on one basis or another, the *fact* that he does not possess that belief. That is this Court must either make a finding of fact as to the existence (or nonexistence) of appellant's belief in God or else consider him within §6(j).

If a court rules that it is to make a finding of fact, it is incumbent upon the court to consider all of the relevant evidence. However, the non-admission by the district court of evidence appellant offered as relevant to this question was impliedly ruled as correct [218 F. 2d 609, 612] presumably on the well-established prin-

ciple that a finding of fact was not to be made by the court. For this Court to consider *now* such a question of fact would be a contradiction of its previous ruling in *Estep, supra.* That is, either this Court holds that appellant is within §6(j) or it holds contra to its previous ruling.

V.

IT WOULD MAKE A FINDING OF FACT WITHOUT ADMITTING RELEVANT TESTIMONY.

As argued in IV hereinabove this Court must either make a finding of fact as to the existence (or non-existence) of appellant's belief in God or else consider him within §6(j).

If this Court rules that it can now make a finding of fact and considers such a ruling not in contradiction with its previous *Estep* ruling, it is still obliged to consider all the evidence relevant to the existence of petitioner's religious beliefs. This Court must either, therefore, hold petitioner within §6(j) or consider the expert testimony proffered in the court below before deciding this case.

VI.

IT WOULD INTERPRET §6(j) IN A MANNER INCONSISTENT WITH THE PRESUMPTION OF ITS CONSTITUTIONALITY.

Possibly this Court will hold that it can make a finding of fact without considering the expert testimony. In that case it is still incumbent upon the Court to consider the other evidence, which is relevant to the question and which is already in the record. That is, either petitioner is within §6(j) or else this Court must find as to petitioner's belief on the basis of not only his claim of non-belief but also other evidence presently in the record.

The evidence that he does not possess such a belief consists only of his own expressed opinion. But this profession of non-belief is insignificant as compared with the contrary evidence—namely, his acknowledged ethical position and conduct.

It is well to recall that §6(j) does not require a *profession* of a belief in a Supreme Being but rather the *possession* of such a belief. Also, it is well known that people often misrepresent their true feelings; sometimes intentionally and at other times because of other reasons. Only the most naive would accept without a rigorous examination a confession of murder, the calling of a poker hand, or the claim of poverty (or wealth).

There are persons who believe that we learn an ethical standard first and that God is a rationalization

used to support the ethics. If such is the case then petitioner might have his conscientious objection to war without a belief in a Supreme Being, finding a theological argument unnecessary for conviction.

But a much more common belief is that good ethics, in particular, love for one's fellow man, *follows,* rather than precedes the presence of God. Indeed, to deny a faith in God while yet possessing attitudes which can exist only in the presence of such a faith is, at best, but youthful folly.

Many of us would say that it not only does the presence of love follow the presence of God, but that it *is* the Presence. Recognition of love for all mankind is tantamount to recognition of the basic reality of God. How better can the true essence of transcendent source be expressed in words? What better proof of the living faith can there be than the recognition of the oneness of all peoples, joined in a spiritual communion, forbearing one another in love? The record shows indisputably that this is petitioner's belief and practice.

The denial of the existence of God can be permitted as a glib symbol for rebellious youths: they hurt none but themselves. But for the Court to give credence to such a profession is another matter entirely; it is to challenge with the weight of the Court's authority the principle that faith in God is the source of good ethics.

Consideration of petitioner's ethical standards is thus seen to lead to the problem of whether belief in God is necessary in order to have love for one's fellow

man. That is, either the Court must find that petitioner does not love his fellow man and does not believe in God, or it must hold that love for one's fellow man can exist without concurrent belief in God, or it must hold that petitioner comes within §6(j).

To find that petitioner does not love his fellow man and does not believe in God is to discredit one of his claims while crediting another. This would be an entirely arbitrary choice and would, moveover, ignore evidence, in addition to his own claims, which is relevant to his love for his fellow man.

That is, this Court must either hold petitioner to be within §6(j) or else find him without love for his fellow man, thus (1) arbitrarily choosing part of the evidence and (2) giving a ruling as to the nature of "love for one's fellow man." On the other hand, if this Court holds that love for one's fellow man can exist without a belief in God, it would in effect prescribe a widely held belief and would be, moreover, a ruling as to the nature of God.

Petitioner does not contend that this Court should hold that love for one's fellow man must necessarily involve a belief in God. Nor does he contend that this Court should find the nature of a man's beliefs to be opposite to those he himself declares. Rather, he contends that if this Court holds that §6(j) does not apply to all claimants for appeal, it necessarily involves itself in theological arguments over which it has no rightful jurisdiction. Put another way, it necessarily interprets Congressional intent to be that the Courts should de-

cide matters of religious belief, an interpretation contrary to the assumption that §6(j) is constitutional and is not legislation respecting an establishment of religion.

CONCLUSION

This petition should be granted for the reasons herein stated.

Respectfully submitted,

J. B. TIETZ
Counsel for Petitioner.

September 13, 1955.

APPENDIX A

OPINION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VERN GEORGE DAVIDSON, *Appellant,*	)	No. 14,356
vs.	)	Aug. 17, 1955
UNITED STATES OF AMERICA, *Appellee.*	)	

Appeal from the United States District Court for the Southern District of California, Central Division.

Before MATHEWS and ORR, Circuit Judges, and WIIG, District Judge.

PER CURIAM.

On December 27, 1954 (218 F. 2d 609), we affirmed the District Court's judgment in this case. Appellant petitioned for a writ of certiorari. On May 9, 1955 (349 U.S. 918), the Supreme Court made the following order:

"The petition for writ of certiorari is granted and the judgment of the Court of Appeals is vacated. The cause is remanded to the Court of Appeals for consideration of whether [appellant's] conscientious objector

claim comes within the provisions of §6(j) of the Universal Military Training and Service Act, in which event this case would be governed by Gonzales v. United States, 348 U.S. 407."

Complying with that order, we have considered whether appellant's conscientious objector claim comes within the provisions of §6(j) of the Universal Military Training and Service Act and have concluded that it does not. The District Court's judgment is, therefore, again affirmed.

(Endorsed:) Per Curiam Opinion. Filed Aug. 17, 1955.

Paul P. O'Brien, Clerk.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[TITLE OF COURT AND CAUSE]

JUDGMENT

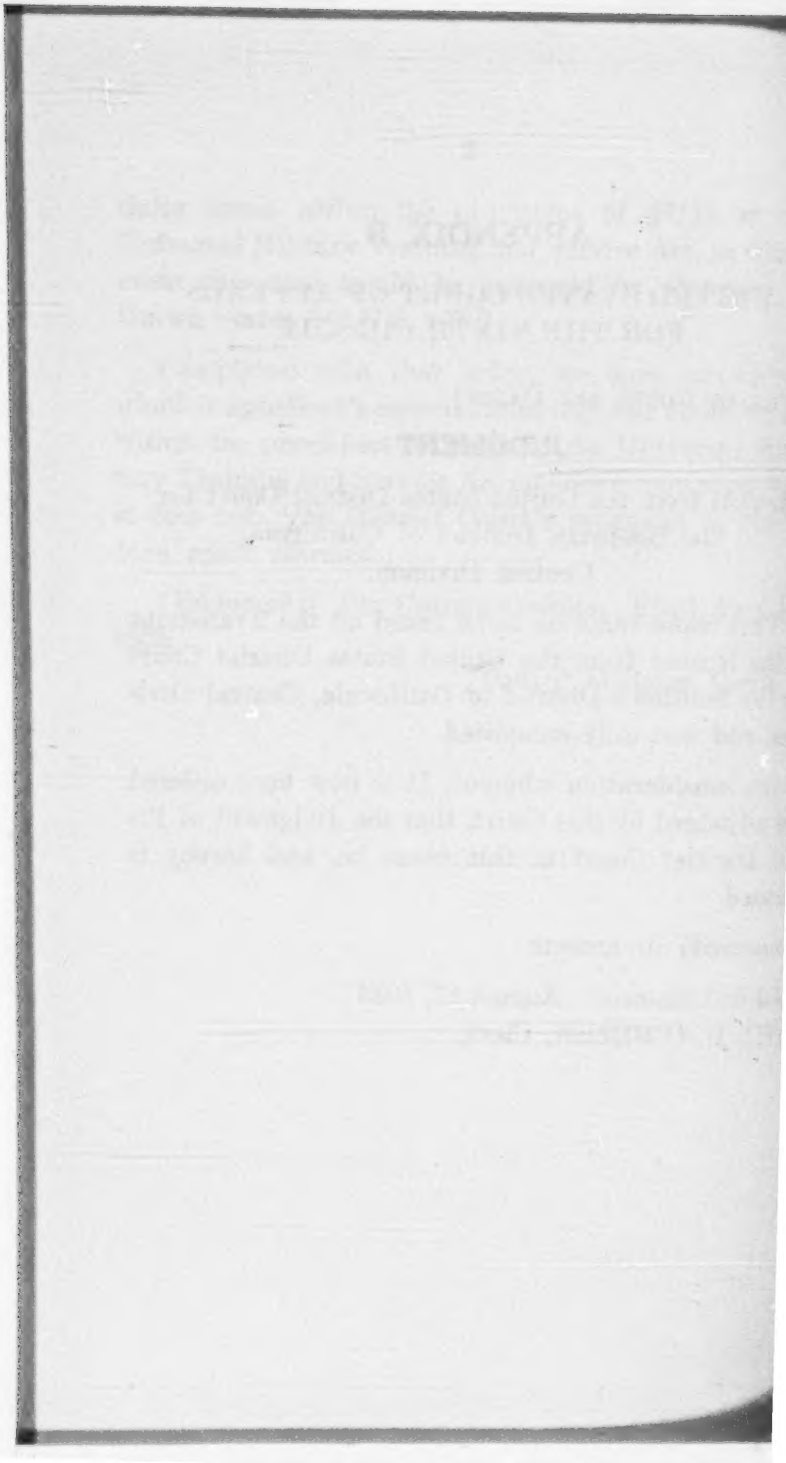
Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment

Filed and Entered: August 17, 1955
PAUL P. O'BRIEN, Clerk.



APPENDIX C

STATUTE INVOLVED

Section 6(j) of the Act

Section 6(j) of the act (50 U.S.C. App. (Supp. V) §456(j), 65 Stat. 75, 83, 86) provides:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in Section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who know-

ingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of Section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant services as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in Section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of Section 12 of this title, to have

knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."—50 U.S.C. App. (Supp. V) §456(j), 65 Stat. 75, 83, 86.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 398

VERN GEORGE DAVIDSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 107-108) on remand by this Court, 349 U. S. 918, is not yet reported. The previous opinion of the Court of Appeals is reported at 218 F. 2d 609.

JURISDICTION

The judgment of the Court of Appeals was entered on August 17, 1955 (R. 109). The petition for a writ of certiorari was filed on September 16, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner—who in selective service documents stated that his conscientious objection to war was the result of political beliefs as a socialist, and not of religious training and belief in a Supreme Being—made a claim under Section 6(j) of the Act so as to entitle him to the administrative appellate procedures of that section.

STATUTE INVOLVED

Universal Military Training and Service Act, 62 Stat. 604, 612, 622; 65 Stat. 75, 86:

Section 6(j) [50 U.S.C. App. 456(j)]:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is

found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, sub-

ject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * *

STATEMENT

The facts in this case are fully set out in the statement on pp. 3-9 of the government's prior brief in opposition, No. 644, O.T. 1954.[1] For present purposes, the significant facts are that petitioner, before his Selective Service Board, claimed the right to be classified as a conscientious objector, expressly stating, however, that his beliefs "are not religious, they are basically political" (F. 11). He stated that he did not believe in a Supreme Being; that his beliefs arose out of a "long education of socialist ideas"; and that he was not a member of a religious sect (F. 20, 21, 23). He said his

[1] The printed record filed in the instant case is the same as that filed in No. 644, O. T. 1954. The designation "F." refers to the selective service file which was Government Exhibit 1 and the numbers given are those in longhand at the bottom of the pages of that exhibit.

allegiance was not to any God or any country, but to humanity as a whole (F. 22).

He was classified as I-A by his local board. On appeal, he had a hearing before a Department of Justice hearing officer, and the Department recommended that he be classified I-A since his objections did not arise from religious training and belief (F. 35-41). That report was not sent to petitioner before he was classified I-A by the appeal board (F. 16).

Petitioner was subsequently deferred as a student. When that deferment ended, he was again classified I-A. He appealed, a second time and was again classified as I-A by the appeal board (F. 16).

He refused to submit for induction and was convicted for such refusal in the United States District Court for the Southern District of California. On appeal, his conviction was affirmed, the Court finding that petitioner had not been denied any procedural rights, 218 F. 2d 609 (C.A. 9).

While the petition for certiorari was pending, this Court decided *Gonzales* v. *United States,* 348 U. S. 407, holding that a registrant who presents a conscientious objector claim is entitled on appeal to receive a copy of the letter of recommendation from the Department of Justice to the appeal board, and to be given a reasonable opportunity to reply thereto. This Court granted the petition for certiorari (349 U.S. 918) and remanded the case to the Court of Appeals "for consideration of whether petitioner's conscientious objector claim

comes within the provisions of Sec. 6(j) of the Universal Military Training and Service Act, in which event this case would be governed by *Gonzales* v. *United States,* 348 U. S. 407" (R. 104).

The Court of Appeals held, "Complying with that order, we have considered whether appellant's conscientious objector claim comes within the provisions of §6(j) of the Universal Military Training and Service Act and have concluded that it does not." It again affirmed the district court's judgment (Pet. App. A, B; R. 107-109). The present petition for certiorari seeks review of the second affirmance of petitioner's conviction.

ARGUMENT

The only issue in this case is whether petitioner is entitled to the benefits of the procedures set forth in Section 6(j), although he himself disclaimed that he was conscientiously opposed to participation in war in any form "by reason of religious training and belief" as required by that statute. If he was within the statute, this Court has already ruled that the procedures actually accorded him did not meet the standard set forth in *Gonzales* v. *United States,* 348 U.S. 407. If he was not, then the Selective Service authorities, in according him the hearing which he did get, gave him more than was his due.

We believe that the court below was correct in holding that petitioner was not entitled to the special procedures established by Section 6(j). His own statements of his claim to be a conscientious objector fully and unambiguously demonstrated that his was not the type of claim to which Section

6(j) relates. The section, by its plain terms, relates to a person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." This is followed immediately by the statement that "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code." There follows the provision that a person claiming exemption because of *"such conscientious objections"* can avail himself of the special appellate procedures provided in the statute.

Apart from the clear wording of the statute, the legislative history shows that Congress intended this result. Prior to the 1948 Act, there was no clause referring to belief in a Supreme Being and the Second Circuit had held that such a belief was not necessary for qualification as a conscientious objector. See *United States* v. *Kauten,* 133 F. 2d 703 (C.A. 2); *United States ex rel. Phillips* v. *Downer,* 135 F. 2d 521 (C.A. 2); *United States ex rel. Reel* v. *Badt,* 141 F. 2d 845 (C.A. 2(. Later *Berman* v. *United States,* 156 F. 2d 377 (C.A. 9), certiorari denied, 329 U.S. 795, took a contrary view in denying the conscientious objector exemption to a registrant whose objections to war were based, not upon religious training and belief, but upon his own philosophical views and personal moral code. In *Berman* the court decided (p. 382) that the phrase "religious training and belief"

must be regarded as a "definite limitation on the scope of the exemption and cannot be deprived of its effectiveness by specious reasoning that something which to its user is more acceptable than some other thing is therefore the same thing." Thereafter Congress clarified its intention by adding to the 1948 Act the clause referring to belief in a Supreme Being. It was stated in S. Rep. No. 1268, 80th Congress, 2d Sess., 1948, p. 14, that the provision as to conscientious objectors "reenacts substantially the same provisions as were found in subsection 5(g) of the 1940 act * * * (See *United States* v. *Berman,* 156 F. 2d 377 [C.A. 9], certiorari denied, 329 U. S. 795). * * *"

Petitioner argues that the mere assertion that he was a conscientious objector gave him an absolute right to have his claim determined by the full course of the Selective Service administrative appeal procedures of Section 6(j) without any "short-circuiting" or "directed verdicts" by the judiciary (Pet. 9, 11). But the law obviously does not require a wholly vain procedure. If a registrant makes no claim cognizable under the statute, the statute does not apply to him. For a registrant to be entitled to the special appellate procedures of Section 6(j) he must, at the very least, make an initial assertion in his Selective Service papers that his conscientious objection to war stems from religious training and a belief in a Supreme Being. He has then made a claim for exemption, which may or may not be upheld as the procedures specified in Section 6(j) are set in motion. If the registrant, however, makes no preliminary assertion

as to religious training and belief in a Supreme Being—or, as the petitioner here, disclaims these in unequivocal terms—he has failed to make a claim for exemption as a conscientious objector within the terms of Section 6(j). Petitioner was not judicially "short-circuited" and deprived of the special appellate procedures under Section 6(j), since he had never made a claim which came within the purview of that statute.

This case is similar to *United States* v. *De Lime*, 121 F. Supp. 750 (D.N.J.), affirmed, 223 F. 2d 96 (C.A. 3), where the defendant's uncontradicted statements disclosed that he was an agnostic, and that his claim was not based on "religious training and belief" within the meaning of the statute. It was there held that he was not prejudiced by failure to receive an adequate or fair resumé of the F.B.I. report, the court stating that "if everything he had said in support of his claim for exemption was fully believed his position continued to lie entirely outside of the statute" (223 F. 2d at 100). So too in the instant case, petitioner's purported claim was completely outside the purview of the statute. [2]

[2] Petitioner's strong reliance (Pet. 12) upon *Sterrett* v. *United States*, 216 F. 2d 659 (C.A. 9) is misplaced, since an entirely different factual situation was involved. In *Sterrett* there was no indication whatever that the defendants' claims for conscientious objector classifications were improper *ab initio* by reason of statements expressly negativing religious training and belief in a Supreme Being. The decision was narrow in scope and predicated upon the language of the regulations at that time, it being held that the registrants could not be denied a Department of Justice hearing after they had been given conscientious objector classifications by the local board, had appealed claiming minister classifications, and had then been classified I-A by the appeal board.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

OCTOBER, 1955.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955